EXHIBIT A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-01789-smb

- x

In the Matter of:

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

Debtor.

- x

Adv. Case No. 10-05355-smb

- x

IRVING H. PICARD, Trustee for the

Liquidation of Bernard L. Madoff Investment

Securities LLC,

Adv. Pro. No. 10-05355 (SMB)

Plaintiff,

v.

ABN AMRO BANK (IRELAND) LTD.(f/k/a FORTIS PRIME FUND

SOLUTIONS BANK (IRELAND) LIMITED) and

ABN AMRO CUSTODIAL SERVICES (IRELAND) LTD. (f/k/a FORTIS

PRIME FUND SOLUTIONS CUSTODIAL

SERVICES (IRELAND) LTD.),

Defendants.

- x

- x

Adv. Case No. 10-04658-smb

- x

IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff,

Plaintiff,

v.

CAROL NELSON,

Defendant,

- x

Adv. Case No. 10-04377

- x

IRVING PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

CAROL NELSON, individually and as joint tenant and STANLEY NELSON, individually and as joint tenant,

Defendants.

- x

- x

Adv. Case No. 10-03800-smb

- x

PICARD,

Plaintiff,

v.

Fairfield Greenwich Group (In re Fairfield Sentry Ltd.),

Defendants.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004

September 25, 2019

10:19 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

ECRO: JONATHAN

Hearing re: Adv. Case No. 10-05355-smb - PICARD v. ABN AMRO BANK (IRELAND)

Trustee's Motion for Leave to Amend

Adv. Case No. 10-04377-smb - PICARD v. CAROL NELSON et al

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Adv. Case No. 10-04658-smb - PICARD v. NELSON

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Adv. Case No. 10-03800-smb - PICARD v. Fairfield Greenwich Group

Conference (also applies to Adv. Pro. Nos. 09-01239 & 12-01701)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: Please be seated.

THE COURT: Good morning.

MR. WARSHAVSKY: Good morning.

CLERK: Fairfield. Fairfield.

THE COURT: Good morning. I scheduled the conference because I got your request to extend the schedule, and I had two points. First is I wouldn't give an open-ended extension. Do you have a date set to start the mediation?

MR. WARSHAVSKY: Owen Warshavsky for the Trustee, Your Honor. We do. As you can see by the bench behind us, there are several parties here.

THE COURT: Mh hmm.

MR. WARSHAVSKY: And so we're scheduling it. We have an initial meeting just myself and Mr. Kazanoff, the counsel for most defendants or the corporate -- I'll let him explain who he's representing, but for the majority of the defendants. We -- and we'll be meeting with Mr. Davis in -- I think it's October 17th. We're trying to schedule a follow-up meeting for the different parties. We've been working through a few issues to try and narrow the scope of the mediation.

THE COURT: Mh hmm.

MR. WARSHAVSKY: In particular, Your Honor, I

think we're focused on the -- there's differences in accounting. We've been working through those issues over the summer to try and narrow it down to --

THE COURT: So how long do you think this'll take.

MR. WARSHAVSKY: I'll ask Mr. Kazanoff to respond.

MR. KAZANOFF: You mean in terms of be ready to have a full-blown mediation or to complete it?

THE COURT: Well, to complete the mediation. As I said, I'm loathe to give an open-ended extension. I'll give you the time you need, but -- and maybe you have to come back, but I don't want to give you an open-ended extension.

MR. KAZANOFF: No, no. We understand, Your Honor. I -- you know, our hope -- at least my -- at least my hope is that, you know, now we're going to involve -- we've invited the Sentry liquidator --

THE COURT: Okay.

MR. KAZANOFF: -- into the mediation. Mr. Molten's here, if you have any questions about that. You know, the scope of the mediation is broad, so to -- but let me -- let me answer your question. When can we be done? Listen, I think it's a -- I think we -- I hope we have a very serious mediation session that hopefully yields concrete results by the end of the year. But I would be -- I think it would be unreasonable to suggest it's going to resolve everything, but I'm hoping that it can significantly

narrow the issues.

THE COURT: Okay.

MR. KAZANOFF: Which is what we're trying to --

THE COURT: Does anyone else want to be heard? What I'll do is I'll give you the extension to the end of the year. I'll schedule another conference so you don't have to submit another order at some point in November, and you can give me an update on the status, whether it's actually progressing or the case has to be tried. Okay.

MR. KAZANOFF: And, Your Honor, so just to be clear, we can hold off on putting in our reply brief to the opposition?

THE COURT: Well, yeah. It's basically -- everything stops. Why don't we say November 26th? That's after Thanksgiving. Okay. So I'll adjourn this conference to November 26th.

MR. KAZANOFF: Thank you, Your Honor.

THE COURT: And you can submit an order. You don't have to do a stipulation, so you don't have to bother to get signatures, which provides for this.

Okay. Thanks.

MR. KAZANOFF: Thank you, Your Honor.

MR. WARSHAVSKY: Thank you, Your Honor.

THE COURT: Picard versus Nelson.

MS. CHAITMAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. CHAITMAN: Helen Davis --

THE COURT: Please keep your voice up.

MS. CHAITMAN: Sure. Helen Davis Chaitman, Chaitman LLP, on behalf of the Nelsons.

Your Honor, we've moved to dismiss the complaints on the grounds that there's no Article 3 jurisdiction because based on the Court's decisions in Avellino, Irving Picard does not have standing to recover funds that were transferred by Madoff individually.

THE COURT: But aren't you assuming the answer to the merits of whether they've proved their claim? In other words, they would have to prove -- or the trustee would have to prove that the LLC made a transfer? And that's -- that goes to the merits of its claim. I mean, what's -- in other words, what's the difference between what I would have to decide factually to resolve your motion and what I would have to decide factually to resolve whether or not they're entitled to a judgment?

MS. CHAITMAN: Well, there are a number of other issues that are raised by the trial in the evidence. The jurisdictional issue I think has to be determined logically before you reach --

THE COURT: No, I understand that, but if I conclude based on the evidence that the LLC didn't make the

transfers, you lose. If I decide that the LLC did make the transfers, then even under your theory, they have standing, right?

MS. CHAITMAN: Well, there are certain documents that were not put into evidence at the trial that are part of the record here. And I think that, for example, just to take one example, the Caraballo 2017 declarations, which we contend were procured with a fraudulent intent by the Trustee, we've now put into -- before the Court the report of Mr. Greenblatt from 2012. Mr. Greenblatt is one of the trustee's experts. In 2012, he issued a report in which he opined upon the documents that were produced by Caraballo in 2017. And we've annexed all the Bates numbers so the Court can see that the Bates numbers from Mr. Greenblatt's report from 2012 included the documents that purportedly were produced by JPMorgan Chase in 2017.

THE COURT: I didn't think that they were produced by JPMorgan in 2017. I just that that's when her certification was up.

MS. CHAITMAN: Right, but the Trustee has never produced the certifications for the original production.

THE COURT: But this is for the trial. He wanted to get those documents into evidence, so he needed a custodian to identify them. They could've been produced 10 years ago, but the trial was in May.

MS. CHAITMAN: I'm not aware of anything in the record which suggests that the Caraballo 2017 declaration was needed to put things in evidence. Number one because there had to have been a custodian of records affidavit at the time of the original production.

THE COURT: But why?

MS. CHAITMAN: I'm sorry?

THE COURT: Why? You need the custodial affidavit for trial. You don't need it before that.

MS. CHAITMAN: Judge, if that were their intent, they would've provided me with a copy of it. They didn't provide me with a copy of it until a week before the trial. It's -- in my -- based on my review of everything --

THE COURT: I understand your argument that they produced a lot of documents (indiscernible), but -- and they should be excluded for that reason, but I don't understand the argument that documents were produced in 2012, and her declaration should -- or her custodial affidavit, which was designed -- you get documents into evidence should speak as of 2012.

MS. CHAITMAN: You know what, Judge? I'm not -- the documents were probably produced in 2009. I assume that the Trustee used the period after his appointment to get all the JPMorgan Chase documents, which of course were essential. I assume those were produced in 2009. We never

saw the custodial affidavit that would've been -- the would've accompanied that production. We saw later custodial affidavits that didn't contain the representation that that --

THE COURT: Well, I saw one for 2015, I think, that didn't even refer to BLMIS, so --

MS. CHAITMAN: Exactly. Exactly. But if -- even -- the productions that were made available to the callback defendants were in the e-data room, those were -- those predated significantly even the 2015 Caraballo declaration. So I think it's --

THE COURT: But isn't the question who owns the account?

MS. CHAITMAN: The question is who owns the account.

THE COURT: Right.

MS. CHAITMAN: There is not a shred of evidence that the LLC owns the account.

THE COURT: Let me ask you a question. Is this -- I was looking through some of the exhibits, and this was one of the trial exhibits which you offered, and it's the deferred prosecution agreement between the U.S. attorney and JPMorgan. Paragraph 7 says Bernard L. Madoff ran the largest Ponzi scheme in history through Bernard L. Madoff Investment Securities LLC and its predecessor and affiliates

collectively Madoff Securities. And then it says Madoff Securities had a continuing banking relationship with JPMorgan and that the 703 account was part of -- part of that relationship.

Why would the government say that LLC had an account if it didn't?

MS. CHAITMAN: You know, Judge, I was not a party to that proceeding, obviously.

THE COURT: But you -- but you offered this document into evidence.

MS. CHAITMAN: But not for that purpose.

THE COURT: But I can read. That's what it says.

MS. CHAITMAN: Judge, I understand that. But the fact of the matter is you can't transfer a bank account without having a document which requests a transfer of the bank account. These -- if you just look at it logically, Judge, Madoff testified that by the time he formed the LLC, he recognized he was going to go under. And obviously what he did was he tried -- he formed the LLC.

THE COURT: He testified to that?

MS. CHAITMAN: Yes, he did in his --

THE COURT: He formed the LLC in 2001.

MS. CHAITMAN: He testified that at that time he formed the LLC. I asked him in his deposition, since he'd been in business for -- since the 1960s -- what happened in

2001 that he formed an LLC.

THE COURT: Mh hmm.

MS. CHAITMAN: And his answer was he realized he was never going to get out of the situation he was in, and he formed the LLC for protection. What did he do then? He notified everyone that did business with his sons through the LLC that he had formed the LLC. He didn't notify JPMorgan Chase. He didn't notify any of the investment advisory customers. He was clearly doing that in order to protect his sons and insulate his sons away from the investment advisory business where he had been perpetrating a fraud.

So the fact -- he knew -- he certainly knew -- when you look at the letters that he wrote to --

THE COURT: How would his sons be implicated if he was running a sole proprietorship any more than they would be -- or less than they would be implicated if he was running it as an LLC?

MS. CHAITMAN: He was not running the sole -- what he -- the investment advisory business was never -- based on any evidence was never run by the LLC. It was -- the boys were running a legitimate trading business. He was running the LLC.

THE COURT: Dubinsky testified, and I found his testimony credible, that it was only one business. And, in

fact, I think the government information that accompanied deferred prosecution agreement, but maybe the statement of facts in the deferred prosecution agreement said that there was one business, and it had a proprietary trading, market making, and investment advisory business.

MS. CHAITMAN: You know what, Judge? I --

THE COURT: But that brings me back to my original question. I don't -- I -- this motion just seems to be the same argument that they failed to prove that there was a transfer.

MS. CHAITMAN: It's much -- it's much more important than that, Judge. This goes to the -- whether the Trustee actually has constitutional standing to be suing in any of the callbacks.

THE COURT: Well, why wouldn't he have constitutional standing if he's alleging non-speculative concrete injury?

MS. CHAITMAN: He doesn't have that injury. You held that in Avellino.

THE COURT: No, no, no. That -- but Avellino dealt with pre-2001 issues. There's no question that post-2001 there was an LLC, and your argument is that the bank account from which the transfers were made were personal. They weren't LLC transfers. His argument is they were LLC transfers. Why doesn't he have standing to make that

argent?

MS. CHAITMAN: Well, he -- I think, look. He -- it's his burden to prove that the Court has jurisdiction. I believe the Court does not have jurisdiction. I think it's -- we -- you know, we've been litigating these cases since 2010 based on what I believe was a deliberate misrepresentation of the most material fact, whether there is jurisdiction here. I think that this impacts so many people, and this deception has gone on for such a long time. I feel that it's important that this go up to the Second Circuit as quickly as possible.

THE COURT: Okay. Thank you.

MR. HUNT: Your Honor, Dean Hunt for the Trustee. It's clear that the Court understands exactly what the issue is. We believe that the post findings of fact and conclusions of law raise those exact same issues.

I would point out, though, that I think it's really not only a matter of who owns the accounts, which clearly is the LLC based on the evidence, but also whether or not the Debtor here held dominion and control over those accounts, which the evidence clearly says is the case.

And based upon that and the evidence that was presented at trial, the fact that they have admitted -- that they now admit that they never contested that they received transfers from a broker-dealer in connection with a

securities contract that they don't appear to contest that this is customer property, that they sought and received protection of the property provided by SIPA, and at the time of the two-year transfers, they were clearly our customers.

THE COURT: But under SIPA, they can only recover a transfer by the debtor. It's treated as -- treated as personal property of the debtor --

MR. HUNT: Agreed.

THE COURT: -- to circumvent, you know, state law rules about who owns the property. But if the transfer were made by Madoff individually, for example, that's not a transform by the debtor, and Madoff is not a SIPA debtor.

MR. HUNT: Agreed. Agreed. But that's not the case here, as indicated by the evidence. So I had a big long argument ready to go. It's pretty clear you understand what the issue is.

THE COURT: Well, I just -- look, I'll decide this as part of the merits of the case. I agree with you that they have the burden of proof, whether it's standing or whether the transfer was made by the debtor, and I'll just decide it in connection with that. I don't see the issues as being separate.

MR. HUNT: Thank you, Your Honor.

THE COURT: All right. Thank you.

Oh, this is (indiscernible) documents. We'll go

through it later.

Picard versus ABN AMRO. Go ahead.

MS. GRIFFIN: Would Your Honor mind if I stayed at the desk?

THE COURT: As long as you speak into the microphone --

MS. GRIFFIN: Okay.

THE COURT: -- that's okay.

MS. GRIFFIN: Good morning, Your Honor. Regina Griffin, counsel for the Trustee.

Your Honor, we're here today on the Trustee's motion for leave to amend, which the Trustee submits is not futile because he has successfully pled allegations that meet the willful blindness standard. And the Defendant's entire argument is premised on the wrong legal standard. And basically what --

THE COURT: What's the wrong legal standard?

MS. GRIFFIN: So they cite to the BNP Paribas decision, Your Honor, which -- in which this Court stated that lack of good faith refers to knowledge of Madoff's Ponzi scheme, i.e. knowledge that BLMIS was not actually trading securities. But the case that is cited there is actually the 546(e) decision, if you look at Your Honor's citation. And in that case with the 546(e) exception, it makes sense that the defendants have to actually know that

there's no trading and that it could be a Ponzi scheme.

THE COURT: So what's the test?

MS. GRIFFIN: The test is what the Court articulated in Katz, Your Honor, and exactly what the Court there said is both sides agree that if the defendant had actual knowledge of Madoff's scheme it would constitute a lack of good faith. But even the Trustee does not appear to undertake the dubious task of plausibility pleading the Defendants knowingly invested in the Ponzi scheme.

THE COURT: But he -- the Court's just saying what the plaintiff -- what the parties agree. That's not --

MS. GRIFFIN: Yes, but he --

THE COURT: That's not a legal determination.

MS. GRIFFIN: But what he goes on to say, Your Honor, is but both sides agree, however, that if the Defendants willfully blinded themselves to the fact that Madoff Securities was involved in some kind of a fraud, this too might -- depending on the facts -- constitute a lack of good faith.

THE COURT: Okay. So what's the fraud if not knowledge but willful blindness of the Ponzi scheme? What's the fraud that they had -- that they suspected?

MS. GRIFFIN: So, Your Honor, the entire willful blindness standard that is developed under criminal law in which Judge Rakoff bases --

THE COURT: I'm just asking you a question.

MS. GRIFFIN: Sure.

THE COURT: You said Judge Rakoff said that they have to have some suspicion.

MS. GRIFFIN: Of a fraudulent --

THE COURT: Of a fraud.

MS. GRIFFIN: Of a fraudulent enterprise.

THE COURT: But what's the fraud in this case that you say they have a suspicion of?

MS. GRIFFIN: Well, Your Honor, we're saying that the Defendants are citing to the wrong legal standard, but we're saying here --

THE COURT: I'm just asking --

MS. GRIFFIN: Sure.

THE COURT: -- what's the difference if the only fraud is the fraud relating to the Ponzi scheme? I've had this in other cases when --

MS. GRIFFIN: I understand, and I'm not trying to be difficult. I'm trying to answer your question. What we allege here is that the Fortis defendants, the employees at the time specifically suspected that Madoff might not be trading and didn't have custody of his assets. That's exactly what we alleged, that -- in our allegations. We're saying we don't need to, but we do that. And in the Optimal case, Your Honor --

THE COURT: But if Madoff didn't have custody of the assets, who did?

MS. GRIFFIN: That's the point. They didn't know what he had custody of. He was getting --

THE COURT: But that's not -- but that's not a fraud. The fraud is that he was telling people that he had these assets when in fact he didn't have them because he was using the money to pay redemptions or for his personal benefit.

The point is -- and we can move on from this -- I hear what you're saying, but the -- some kind of fraud that we're talking about is that he's not trading securities.

MS. GRIFFIN: Three is some concern that he is not doing what he's saying he's doing, Your Honor. And they deliberately act -- the mens rea --

THE COURT: But other than not trading securities, what is the fraud? In other words, you've had other cases where they talk about cherry picking, or they talk about front running.

MS. GRIFFIN: Right.

THE COURT: That's not even in this case.

MS. GRIFFIN: Right.

THE COURT: So what's the fraud?

MS. GRIFFIN: I guess, Your Honor, my question to you is why do you believe that at the time, they had to

specifically suspect exactly what he was doing rather than what the Second Circuit said in Nektalov is it doesn't matter if they're -- if they are subjectively correct about what they suspect. But the culpable act of deliberate ignorance is what we're talking about here. If they suspect some sort of a fraud, and that's what Judge Rakoff said.

THE COURT: But what -- you know, look, let's get off this, but I keep asking you the same question. Why does some sort of fraud that you think they suspected or you plead they suspected other than Madoff wasn't really trading securities?

MS. GRIFFIN: And, Your Honor, that's -- you're absolutely right, but that is exactly what we plead.

THE COURT: Okay.

MS. GRIFFIN: Okay. And Your Honor --

THE COURT: Glad we resolved that.

MS. GRIFFIN: Well, Your Honor, we absolutely plead that the Fortis defendant suspected that he wasn't trading based on the fact that, at the time, the Defendant's employees were very concerned that they couldn't get two independent streams to verify that the trades were actually taking place.

THE COURT: So why'd they invest $500 million? I'll give out the benefit of the collateral. Why'd they invest $500 million and why didn't they pull the money out

if they suspected that it was a Ponzi scheme?

MS. GRIFFIN: Well, Your Honor, like Judge Rakoff in Katz said is perhaps they thought they could get the short-term profits -- the benefit of the short-term profits while they thought they could minimize the risk.

And let me point out that in Katz, Your Honor, the two things that the judge pointed to were, one, that they considered Ponzi insurance, which they never got. And two, they considered -- they created a hedge fund to minimize their exposure to Madoff. Neither one of those would have worked, but the point here is that where they thought they could minimize the risk but still keep procuring the short-term gains, that is enough that they --

THE COURT: How'd they minimize the risk?

MS. GRIFFIN: I'm sorry. I don't --

THE COURT: How'd they minimize the risk, by investing in the private fund or the Broad Market fund?

MS. GRIFFIN: They mimed the risk by -- well, that was the hedge to --

THE COURT: So that increased their risk, right?

MS. GRIFFIN: It certainly did, Your Honor, but they also had those built-in protections that none of the other Tremont investors got. That's what we need to focus on here. They got protections that put them ahead of all the other individual investors. These aren't one of the

(indiscernible) things that every Tremont individual investor got. They got collateral, so the first third of their money is not exposed. And I --

THE COURT: The last part of the -- is part of the swap, the collateral.

MS. GRIFFIN: Yeah, and --

THE COURT: That's the -- that's the deal.

MS. GRIFFIN: And so that's one part of their state of mind that goes into how are we minimizing the risk? They also --

THE COURT: But that's the deal. They're investing $230 million, and they're going to pay three times the performance of -- I guess it was the Broad Market fund which was the (indiscernible).

MS. GRIFFIN: Your Honor, at the time that they entered into the swap, they had already been willfully blind since 2003. They had already exhibited that willful blindness by being so concerned that they could be liable for Madoff's acts as custodian -- they had so little faith that he actually had custody of those assets they up and moved. So what you have to look at is --

THE COURT: Of course they moved. The -- what was it, Bermuda?

MS. GRIFFIN: Bahamas.

THE COURT: Bermuda had imposed -- well, the

Bahamas had --

MS. GRIFFIN: Yeah.

THE COURT: -- now imposed more rigorous regulations, so they moved to another jurisdiction that had less rigorous requirements.

MS. GRIFFIN: Your Honor, they did it in deliberate reaction to Madoff. They were that concerned. If you look at the emails that they're -- that we cite to in our amended complaint, they are not doing this just as a deliberate, hey, we want to get out generally --

THE COURT: Can I consider the allegations in your earlier complaints?

MS. GRIFFIN: Yes, Your Honor. I mean --

THE COURT: No, I'm just asking.

MS. GRIFFIN: So, I mean on his --

THE COURT: Is it -- as a matter of a 12(b)(6) motion, can I look at the allegations in your earlier complaints? Because one of the arguments they say is, you know, your earlier complaints did allege a lot of due diligence by them.

MS. GRIFFIN: I am so glad you asked that, Your Honor.

THE COURT: Okay.

MS. GRIFFIN: Because here, it's very clear -- Defendants made it very clear that there was no amount of

due diligence that could ever satisfy them.

If you'll give me one second.

In September 2003, Brenda Buckley insisted that without two separate streams of information that can be provided that will allow independent reconciliation of the trades, Fortis should not provide financing to its customer, should change legal jurisdictions away from the Bahamas.

THE COURT: But isn't it more due -- updated due diligence in 2006 or 2007?

MS. GRIFFIN: In July 2004, Fortis again confirms that independent verification that Buckley wanted was not possible. And here's the quote. Madoff's double role implies there is no guarantee that the trades and positions provided by Madoff to Fortis's administrator are objective, and it is not possible to obtain independent confirmations on trades and positions." Cadogan later said -- they describe Madoff as a black box investment dilemma, a phenomenon long-term record but meaningful access to meaningful information was unviable.

Again in 2008, Cadogan and FMM decided to redeem because of the unwillingness of the Madoff organization to provide sufficient transparency.

THE COURT: Wasn't there some sort of due diligence prior to the swap transaction?

MS. GRIFFIN: Yes, Your Honor, but they could

never get -- according to these people in the complaint, they could never get the independent verification which was the very thing that triggered their concern.

THE COURT: But -- okay, but how can you say they're willfully blind if they're suspicious?

MS. GRIFFIN: Right.

THE COURT: Which you're saying. And then they do this due diligence.

MS. GRIFFIN: But, Your Honor, if you are concerned that he doesn't have custody of assets, if you ask him who your board of directors are and what's their title and what's their training, that is never going to resolve what the key issue is. There is check-the-box due diligence, and there is what these people reported up their line to their credit committees, to their central board that concern them the most. And they could -- they said it was impossible to ever get sufficient due diligence that would satisfy them.

THE COURT: Okay, but they didn't turn a blind eye. They found out what they could. They couldn't get satisfactory answers, and then they were willing to invest the money, but they --

MS. GRIFFIN: That is --

THE COURT: But they didn't turn a blind eye.

MS. GRIFFIN: Not getting confirmation of that

which you say is essential, which Buckley said is essential since 2003, is the act of turning a blind eye. Continue -- Judge Rakoff held this in Katz. Continuing to reap short-term benefits while just looking away to -- and thinking that you can minimize the risk by shifting jurisdictions and not being liable or by -- you have these things in your -- in your swap transaction that you think might project you.

And by the way, Your Honor, they don't -- it's about what these people thought at the time, and we cite in our papers the fact that these institutions, after the 2008 financial crisis, there were -- there were articles written and congressional testimony given that individuals at these institutions have personal financial incentives that -- to take on risky transactions that are contrary to the long-term benefits of their institution. So --

THE COURT: I agree with you that maybe with investment managers who don't have a lot of skin in the game and get enormous fees, if that's the case, but this is a lender, essentially, who -- let me finish -- who's loaning $470 million. What you're saying, they knew or should have known -- well, I shouldn't say should have known -- but they willfully blinded themselves to a Ponzi scheme, and, you know, they -- even Judge Rakoff said nobody would -- nobody would plausibly allege that they knowingly invested in a Ponzi scheme.

MS. GRIFFIN: Right, and that's not what we have to plead. But, Your Honor, the -- Judge Kimba Wood explained it best in the Fischbach Securities case that we had cited in our brief. She wrote there, facts suggesting reckless disregard of the truth in a 10(b)(5) case often suggest willful blindness. In most cases of reckless disregard of the truth, defendants have had a motive for deliberately remaining ignorant of the fact in question, rendering their characterization as willfully blind more plausible. The defendant is motivated not to open his eyes to the underlying facts since this would place him in a position of terminating his profitable financial situation and exposing his associate or continuing to participate in the fraudulent activities but now without his cherished modicum of deniability.

Your Honor, with all due respect, I think you're conflating motive and opportunity, which requires this huge personal benefit as the scienter element when we are pleading an alternative that is reckless disregard. That is where you consciously turn away from something because you have a profitable association. It's not $100 billion. I get -- I grant you this is not a feeder fund where they're reaping all that, but it explains -- she says -- Judge Kimba Wood says it explains why these non-neophytes in the financial institution marketplace would turn a blind eye.

That's why it doesn't have to be a bullet-proof protection to a Ponzi scheme. It's just they thought they can continue to do this while not getting the confirmation they said they needed.

THE COURT: I had a different question which I was going to ask both of you. Having read Judge Rakoff's 520 -- was it 546(g) decision.

MS. GRIFFIN: Sure.

THE COURT: Most of the discussion concerns willful blindness under 550(b), but there's some confusion, at least in my mind, whether there are two safe harbors or, at least with respect to the collateral -- there's only one safe harbor, five --you know, 546(g). It doesn't apply, and I guess they could be liable for, under state law, for constructive fraudulent transfer.

Or even if 546(g) doesn't apply, is it possible that 546(e) applies to the same transfer.

MS. GRIFFIN: Your Honor, I think -- the first thing I'll say is that I -- respectfully, I don't think you have to answer that question here for our purposes.

THE COURT: Well, I'm curious.

MS. GRIFFIN: I know. I think in a nutshell that in the 546(g) case, the judge there was focused on an argument where the focus was on the defendants. And if you look at the language of the decision, it was about did the

subsequent transferee, was it made by or -- was the transfer made by or to the benefit of the subsequent transferee. And under those circumstances, he said that with respect to the participants of a swap transaction, which is what Defendants were, the mindset is irrelevant because that swap transaction actually occurred.

THE COURT: But he was talking about the initial transfer.

MS. GRIFFIN: He was talking about the -- right. but if you look at the language of the --

THE COURT: So if the initial transfer from BLMIS to, I guess, the Broad Market fund --

MS. GRIFFIN: Mh hmm.

THE COURT: -- is not safe harbored, the trustee could recover that initial transfer or avoid that initial transfer on a variety of theories. As I understand the defendant's argument, that even if that transfer is not safe-harbored under 546(g), it's safe-harbored under 546(e), which just struck me as odd that you would have two safe harbors.

MS. GRIFFIN: I think it's because Judge Rakoff held that the mindset of the participants -- whether the swap actually took place is irrelevant. I think that's what the -- you asked the difference.

THE COURT: I'm asking a different question.

MS. GRIFFIN: Yeah. Okay.

THE COURT: Let's all agree that 546(g) does not safe harbor the $235 million swap because that's what Judge Rakoff held.

MS. GRIFFIN: Could you repeat that, Your Honor?

THE COURT: Yeah. I'll read from his decision.

MS. GRIFFIN: Yes.

THE COURT: He's talking at the end. In sum, the Court finds that both the initial transfer of the redemption and collateral payments were made in connection with swap transactions. Only the initial transfers of the redemption payments and not the collateral payments were made, quote "for the benefit of the defendants here," closed quote. So he seems to be saying that the transfer from BLMIS to, I guess it's itinually to the Prime Fund. I forget who the initial transferee is, but let's just say Prime Fund.

MS. GRIFFIN: Right.

THE COURT: The initial transfer from Tremont -- to Tremont for the purpose of investing in a swap is not safe-harbored under 520 --546(g). That's what he seems -- that's how I read this.

MS. GRIFFIN: The way we read it, Your Honor, is that the redemption payments to Tremont were safe harbored. The collateral was not under the second --

THE COURT: But you have to avoid the initial

transfer in order to recover the subsequent transfers.

MS. GRIFFIN: Correct.

THE COURT: And if you can avoid the initial transfer relating to the $235 million delivery of collateral, the collateral transfer, on theories of state law, preference, whatever it might be, it seems it's easier for you at least to avoid that initial transfer as opposed to the initial transfer which led to the redemption, which presumably is safe-harbored under both 524(g) -- or is safe-harbored under 524(g).

MS. GRIFFIN: I agree with you there, Your Honor, because there was no -- there was no distinction made that between the initial transfers that Tremont made on a daily basis that were then directly tied, as Judge Rakoff pointed out, to the redemptions that were made --

THE COURT: Let me ask the question different.

MS. GRIFFIN: Okay. Yeah. Okay.

THE COURT: If I conclude that the collateral transfer is not safe-harbored under 524 -- I keep saying 524 --

MS. GRIFFIN: 546.

THE COURT: -- 546(g), do I then have to consider whether that same transfer is safe-harbored under 546(e)?

MS. GRIFFIN: Your Honor, we believe the logic of the 546(e) is the direct reason why the Defendant's argument

on this -- on the collateral provision doesn't apply. But --

THE COURT: We're not getting anywhere.

MS. GRIFFIN: Okay.

THE COURT: All right. Why don't you -- why don't you wrap it up?

MS. GRIFFIN: Okay, Your Honor. I guess for the reasons that we've put forth in our papers, we believe that the Trustee has pled willful blindness allegations consistent with the standards set down in Katz and with the other caselaw in the circuit on willful blindness.

THE COURT: Thank you.

Good morning.

MR. HARRIS: Thank you, Your Honor. Chris Harris of Latham & Watkins for Defendants ABN AMRO. If it's all right with your court, I'm going to address the 550(b) good faith defense, and my collage, Kevin Mallen will address any questions you have on the no diminution of the estate and also the issue we were just describing, which is 546(g) and (e), and whether that means there's a double recovery that's (indiscernible).

THE COURT: Well, not a double recovery, but if I conclude that 546(g) doesn't apply, can 546(e) still apply with the same initial transfer? That's my question.

MR. HARRIS: Understood. I'll just give a

preview. There is a difference that Judge Rakoff found in his 546(g) decision.

THE COURT: Yeah.

MR. HARRIS: Which is that under 546(e), the state of mind of the recipient of the initial transfer is relevant, and under 546(g), it's not.

THE COURT: I understand the difference. I'm just asking whether both apply or only one applies.

MR. HARRIS: They both apply, Your Honor.

THE COURT: Okay.

MR. HARRIS: I'll let my colleague explain why, but it's basically because we made an argument today, we did not make before your -- before Judge Rakoff, and he noted we didn't make it. And we preserve the ability to make it now, and they don't deny it.

THE COURT: Okay.

MR. HARRIS: Which is that Tremont itself satisfies the definition of a financial participant, and it was for the benefit of Tremont.

Let me tell you what I would like to address with Your Honor. I was not planning on going into the standard because I know that's before Your Honor on a number of cases. I am happy to if you would like.

The one thing I did want to point out is this issue that they are raising. Do you have to have knowledge

of the Ponzi scheme fraud or some other fraud? Does it matter here?

THE COURT: Well, the argument -- one of the arguments Ms. Griffin has made is that you did whatever you did. You suspected -- you were concerned about some of the way that Madoff did business. You did what you did, but you could never really satisfy yourself. It was impossible to satisfy yourself because of Madoff's secretiveness and whatever else that he really had custody of the assets with him. And then you take the -- you receive the transfers, the subsequent transfers anyway.

And I guess the argument is if you can never really satisfy yourself, and you take the transfers, you've turned a blind eye.

MR. HARRIS: Your Honor, that is just factually untrue according to what they allege, which is that these people who were involved in 2003 and '4 were then involved in the relevant time period, 2007. We did diligence in the interim. That diligence resulted in a diligence memo, January 2017. And it is extremely clear --

THE COURT: 2017? 2007.

MR. HARRIS: I'm sorry, 2007. Thank you, Your Honor. And it is very clear what we concluded, which is that not only is his exposure what you would expect, not only is his reputation excellent, but let me -- let me quote

to you the conclusion. This is --

THE COURT: This is (indiscernible).

MR. HARRIS: This is in the Gibson -- Giblin declaration Exhibit C.

THE COURT: Okay.

MR. HARRIS: This is the conclusion on Page -- on Page 5. Quote, "our review of the trades executed on behalf of Harley through 2006 indicates that the trading mandate has been implemented effectively and consistently." That is the exact opposite of a belief that BLMIS hasn't been implementing its trading mandate but instead is a Ponzi scheme where no trades occur. It is impossible to both think that he's effectively implementing his mandate and that he is not doing any trades. So you know what the end result here is after we do our diligence. We believed he was implementing his trading mandate. That's the end result.

You -- there are other documents from that sign -- same time period that also show that we believe BLMIS was executing trades. They cite the internal resonance from September 2007. That's the Giblin declaration Exhibit D, and that says that we could reconstruct the portfolio two days after trade tickets are received. They also cite the November 2006 credit application. That's Giblin declaration Exhibit E, and it said that Madoff provides copies of

individual trade tickets from each and every trade on the brokerage account on a daily basis. It is very clear, to cut to the end of the chase, that we believed Madoff was executing his trading strategy. That's what we said. And based on that, the relevant time period we then did the swap agreement.

A couple other points I'd like to make on good faith because they aren't in our briefing because they came up in the reply. What you just heard in response to Your Honor's question, why would we risk -- why would we invest $500 million? What you heard in response was fees. What they don't tell you is what were those fees? Well, you can look at the documents. The swap agreement, which is Giblin Exhibit B, Page 6, tells you the fees, and they are miniscule. It is 0.9 percent over LIBOR -- 0.9 percent over LIBOR. That is half the fees in the BNP case. The spread is half of the 1.7 percent over LIBOR in the BMP case Your Honor already found was not a credible economic incentive.

So in other words, the Trustee's theory is that we intentionally invested -- we'll use Your Honor's number -- $500 million in a Ponzi scheme knowing it would have to fail eventually on the chance of earning $2 or $3 million a year. It is simply incredible.

Their only other response is, well, we were in bad economic straits, and so we had an enhanced motive to make

risky transactions. Well, it's one thing to do a gamble on buying a lottery ticket where it's risky but there's a big upside. That's not what they allege here. The situation here is there is -- we're investing in a Ponzi scheme where we know it's going to fall apart, and we have no chance of a big upside. All we're going to get is a 0.9 percent fee if we happen to get -- keep getting those fees before it crashes. That is not just implausible but inconceivable that any rational economic actor would do that.

Couple other points I'd like to make on good faith, Your Honor. If you look back at the 2003 and 2004 documents that they cite, none of them mention a risk of fraud, any fraud. And that's why -- sorry to say, Your Honor, this dispute we -- you were having about does it have to be some risk of fraud or Ponzi scheme in particular doesn't matter in our situation because there is no document cited throughout or any quote of a person --

THE COURT: Well --

MR. HARRIS: -- where anyone suspects that (indiscernible) was engaging in fraud.

THE COURT: Well, there are -- there are documents where they're questioning whether he was actually trading in securities.

MR. HARRIS: Your Honor, I don't believe there are.

THE COURT: That was my recollection.

MR. HARRIS: Counsel said that, but there's no document that suggests he wasn't trading in securities. And, in fact, if you look at the 2003 documents, they suggest the opposite. If you look at Giblin Exhibit F, it says that Harley, quote, "receives trade tickets, and the portfolio is also independently priced with the exception of the over-the-counter options," and it also says there is subsequently a further reconciliation as the trade tickets come in. Sounds like they think they're trading.

If you look at Giblin Exhibit G, it talks about Harley's investment strategy. And it says Harley has changed from investing 100 percent in treasury bills to investing in 50 S&P stocks hedged by synthetic (indiscernible) and that has, quote, "changed the risk profile."

Clearly, the person writing this thinks that this trading is happening, and that's why the risk profile has changed.

And the other thing that's striking about these documents is that they also -- the same people writing them recommended that Fortis consider pitching to become the custodian. Who pitches to become a custodian of a Ponzi scheme or a fraudster or anything like that? No one. It's not economically rational. That's why there is no document

that says we think he's not actually doing trades. It just doesn't exist.

A couple other points I'd like to make on good faith -- good faith. They mention a few third parties. They mention MeesPierson, Cadogan, Fortis Multi-Management. I don't have those documents because they're third parties, and the Trustee declined to give them to me for this hearing when I asked. But based on what they -- how they described them in the complaint, we know that all of these entities just had access to the same red flags that have been found numerous times did not satisfy willful blindness.

So if you look at the complaint, the way they structure it is Paragraph 159 talks about the Cadogan concerns, A, B, C, D, all these different red flags. And then Paragraph 160 says, quote, "Cadogan's list looks substantially the same as the Mees memo. Fortis employees' concerns articulated in connection with Harley, and Fortis Multi-Management's observations and questions." So we know whatever those documents are, it's all the same thing you can find in 159. And nothing in that list is a belief that there's a Ponzi scheme. Nothing in that list says he's not actually trading. So these are just the same red flags that already covered in BNP, for example.

The other thing I'd say about all this, these third parties, is what they allege is that these concerns

filtered up to FMM, which is on the other side of the business from the defendants here.

THE COURT: Can I decide what -- what you're really talking about is imputation. Can I decide that on motion to dismiss?

MR. HARRIS: There certainly are cases that we cite where it is decided on a motion to dismiss. But I -- even before you get to imputation, there's another point I wanted to make, which is if you look at what FMM -- so these all bubble up to FMM. Great. I don't know what those documents say, but I do know how FMM took them. And that's because if you look at Paragraph 156, it tells us. It says that FMM stopped investing in Rye because of, quote, "concerns with counterparty risk," and they explain that means concerns that (indiscernible) counterparties like Goldman would go bankrupt, "cost of leverage, liquidity." You can also look at Paraph 141 where they again explain what counterparty risk means. It means that BLMIS was so big it was exposed to risk if its counterparties like Lehman failed.

So that's what FMM was concerned about and why it stopped doing business. It was concerned about counterparty risk, cost of leverage, liquidity. So whatever percolated up to FMM, it's not a concern that BLMIS was a Ponzi scheme or there wasn't engaging in trades. It was other reasons.

On imputation, to answer your question, yes. There certainly are lots of cases that we cite and where you -- Courts have decided there's no agency as a matter of law on a motion to dismiss based on the allegations. Here, the only thing that they allege that ties us is they allege -- well, first they say that we are part of the same global risk management evaluation. And therefore, the inference is that they must share their concerns with us. That is just like in BNP where Your Honor held that complaint does not allege facts supporting the inference that the knowledge garnered on one side was shared with the other.

And, in fact, the actual facts here show that it wasn't because if you look at our documents, the credit memo from November, the January -- November 2006, the January diligence, none of them mention FMM. None of them mention any concerns from them. And, in fact, the credit memo -- that's Giblin Exhibit E -- talks about Tremont being a new relationship. That's on Page 2 of it.

So it's not only that there's no facts alleged, but what they do allege suggests that there was no sharing of concerns.

THE COURT: Can I consider all of these documents in connection with the motion to dismiss? I assume I can consider the swap because that's the underlying -- that's one of the underlying claims, the principle claims. But,

for instance, you've attached as Exhibit a Fortis's annual review for 2005. I don't recall them relying on that.

MR. HARRIS: Your Honor, all the documents we attached were cited in their complaint.

THE COURT: In the original complaint?

MR. HARRIS: Some were in the original. Some were in the amended.

THE COURT: All right. I'll --

MR. HARRIS: And they, you know, agreed that we can -- they're fair game. So, yes. They are -- they all can be considered.

Just a couple other points I wanted to make on good faith, Your Honor. The -- really the last point I wanted to make on it is the standard here, whether it's knowledge of the Ponzi scheme or knowledge of some other fraud, it's not a suspicion. It is high probability.

THE COURT: High probability. I use suspicion as a shorthand.

MR. HARRIS: Well, the Global-Tech case tells us what that means. It means, quote, "you can almost be said to have actually known the critical facts." Almost actually known. And then the Supreme Court tells us that's more than recklessness, which is a substantial and unjustified risk. And they -- it then tells us certainly more than negligence, which is just that you should've known. Okay.

What is it -- taking everything they -- all the inferences they drew -- draw as true, what do they allege? They allege negligence. They say that -- this is on Page 2 of their reply brief. They say the same thing on Page 5. Fortis acquires subjective belief Madoff might not be trading and could be misappropriating customers' assets. That is negligence. And counsel just said the same thing today. She said they believe that -- we had a belief that they might not be trading and didn't have custody of the assets. Nowhere is there even an assertion that we had a high probability that we could almost be said to have actually known that there was -- whether it's the Ponzi scheme fraud or some other fraud.

Second point I'd like to turn to is the diligence, turning a blind eye. So, as Your Honor noted, and they don't dispute, we did extensive diligence both in 2003 and 2004. And then we did more in 2006 and 2007. 2006, we met with Madoff, or with BLMIS, asked our questions, got answers. We also got trade tickets and reconciled and confirmed, and then we did further diligence on Tremont itself, and we did diligence on its controls and its ability to manage the Madoff relationship. We did all of that diligence in -- up -- leading up to the 2007 decision. So it's simply not true to suggest we turned a blind eye. We did the exact opposite of that.

In terms of the two things that they do point to, to suggest are turning a blind eye, which is the transfer of administration of Harley from Bahamas to Cayman and then the deal protection devices, they are confusing or conflating avoiding risk with avoiding knowledge. Neither of those two things have anything to do with avoiding knowledge. So if you look at the transfer back in 2003, they say it was trigged by these new Bahamas statutes. But as we explained, and they don't deny, those statutes had nothing to do with obtaining knowledge. There was no duty to investigate or verify the trades were being executed in the new statute. It didn't impose any duty to verify the conduct. And, in fact, it decreased the deputy in some instances.

We pointed that out, and they don't -- they don't deny that. What they say is, well, that doesn't matter. It doesn't matter what the statute actually says. What matters is what do the people think? Okay. Well, then look at the documents that they cite. The Giblin declaration Exhibit F, that is the documents where they say talks about what our concerns were, and those concerns were about liability. Nothing about them says anything about a duty to investigate BLMIS.

So the transfer didn't result in and wasn't triggered by any desire to avoid learning. It was a desire to minima our economic risk, which is not surprising.

The other thing they point to is the deal mechanism in the swap transaction. Again, none of those are about avoiding knowledge. They are about avoiding our economic risk. They are not unusual. As Your Honor has pointed out, they are normal indemnification techniques.

The other thing we got was a most-favored nation clause, which again is not usual. That happened to then drag along specific fraud-related items that a different party, RBS, had negotiated, but we didn't request them. And, in fact, we did the original swap transaction without having them. So those are not evidence at all that we are turning a blind eye or even were aware there was fraud.

The other thing I would like to turn to now, just quickly, is value because we argue that we provided value. That's the other prong. There were two sets of transfers here. One was related to collateral, and they don't deny that we provided value in exchange for collateral. And it's not surprising because we gave -- we gave exactly what Tremont wanted, which was we gave them this enormous leverage return. They do challenge that we provide value on the second thing, which is the $30 million redemption, which Judge Rakoff already found was triggered by Tremont reducing the size of the swap.

Well, we did provide -- and we provided value in two ways. We gave up a stock, and that has two different

forms of value. One is the stock itself has value. Now, they say, well, it's a bankrupt entity. Therefore, it has no value. That's just not true. Companies in bankruptcy, their stock has value because it has option value. You never know what's going to happen. and that's why there's several cases, and Your Honor cited them in BNP, explaining specific to the 550(b) context by giving up stock in a bankrupt company, you can add value.

The second kind of value is by giving up the stock, we gave up the litigation claims against Tremont and Rye that are associated with that. And that's a second form of value. It's similar to this --

THE COURT: I understand (indiscernible) anything like that.

MR. HARRIS: Well, Your Honor, I'll -- let me explain what happened on those because actually --

THE COURT: It's not in the complaint.

MR. HARRIS: Well, it is. Both of these are conceded in the complaint. Let me -- let me show you where.

THE COURT: I know the complaint refers to them as redemption, as a redemption.

MR. HARRIS: That's right. They concede they're redemptions, but they also concede the two value points I just made. So let me -- let me tell you where. The first is that they admit that the Broad Market shares ended up

having value. Where did they admit that? Well, they admit that in the Tremont settlement, the Trustee gave Broad a $1.6 billion claim plus its share of a $800 million (indiscernible) claim.

So we know -- no surprise -- that Broad in fact has a lot of -- is going to have a lot of assets, and those shares will have value that will flow from Broad. That's the first prong. Just like many bankrupt entities, there may still be value for the shareholders, and they admit that. One place you can look at that is Reply Brief Page 29. They concede that this settlement occurred, and they granted billions of dollars of claims to Broad, the entity whose shares we gave up.

The second thing they also concede is these litigation claims. So --

THE COURT: Where's that in the reply brief?

MR. HARRIS: That's in Paragraph 217. Because what happened, which they concede is that there was a settlement between the Rye shareholders and Tremont of litigation claims, and these resulted in hundreds of millions of dollars being paid by Tremont, and they calculate our share of that would've been several hundred million dollars.

So there's two different forms of value, and they're both conceded in the complaint. Broad itself will

have money to distribute, and we got money from Tremont, and so we gave up the portion of it that was associated with the $30 million claims.

The last point I'd make on --

THE COURT: I don't understand that. You got dollar for dollar for your $30 million of investment. You're not getting dollar for dollar for the money you left in the fund.

MR. HARRIS: Well, what they're sign is our shares were worthless, right. 550(b) doesn't ask whether you gave reasonably (indiscernible) value. It says did you give any value, value (indiscernible).

THE COURT: Right.

MR. HARRIS: They're sign the shares we gave up were worth zero. And I'm saying no. If I'd kept them, I would've gotten money from Broad.

THE COURT: Right.

MR. HARRIS: And I would've gotten money from Tremont. And there's evidence in the complaint that supports both of those.

If Your Honor has any other questions -- if not, I'll let my colleague speak about the other defense.

THE COURT: Sure.

MR. MALLEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. MALLEN: Kevin Mallen with Latham & Watkins for the ABN AMRO defendants, and I'd like to speak a little bit first about the 546(g) defense and then a little bit on depletion of the estate defense.

THE COURT: Okay.

MR. MALLEN: So on 546(g), we just would like to make the point that we do still advance our argument that the 235.5 million collateral is covered by Section 546(g). And --

THE COURT: I thought Judge Rakoff said it wasn't.

MR. MALLEN: Well, Judge Rakoff said it wasn't because we had advanced in our prior briefing only that Fortis -- that it was the swap transaction or -- excuse me, that the initial transfer was for the benefit of Fortis, but we hadn't advanced the arguments that we now advance in our current papers, which is that there are two other entities that can satisfy the (indiscernible) entity requirement of Section 546(g), one of them being Rye XL. And the initial transfer of the benefit of Rye XL because it allowed Rye XL to obtain the leverage investment (indiscernible), and that's something that Judge Rakoff recognized in the 546(g) decision. And then Rye XL is also a financial participant because by entering into the over $700 million swap transaction, it satisfied Section 546 -- or, excuse me, the requirement for a financial participant to have a gross

(indiscernible) market position of at least $100 million within 15 months of petition date.

We also put forward that (indiscernible) would also be a financial participant for the purposes of 546(g) with the initial transfer and (indiscernible) Tremont complaint, which was --

THE COURT: But didn't Judge Rakoff say that it was for the benefit of Tremont, and Tremont was not a -- or implicitly was not a financial participant?

MR. MALLEN: But we didn't --

THE COURT: Why --

MR. MALLEN: I don't belle we advanced that argument in our papers at the time.

THE COURT: Why not?

MR. MALLEN: I don't believe it was addressed in the (indiscernible).

THE COURT: Was the argument limited to the applicability of 524 -- 546(g)?

MR. MALLEN: Excuse me, Your Honor?

THE COURT: Was the argument or the issue before Judge Rakoff -- because he withdrew the refence on a lot of the issues --

MR. MALLEN: Sure.

THE COURT: -- if you look at the order, including 546(e), obviously. Was the argument limited to the

applicability of 546(g) before Judge Rakoff that triggered this decision?

MR. MALLEN: My understanding is that it was, Your Honor.

THE COURT: All right. Is that -- is that the Trustee's understand?

MS. GRIFFIN: I don't -- I don't know in which way you think it's limited. I think the issue of 546(g) -- I mean, you advanced an argument pursuant to --

THE COURT: Did they -- well, the question -- did they make an argument in that case that even if 546(g) didn't apply, 546(e) did or something like that?

MS. GRIFFIN: I don't --

THE COURT: Okay.

MR. MALLEN: We certainly advanced argument in this case that 546(e) applies if 546(g) does not.

THE COURT: Well, I don't know what the answer is, but there seems to be some sort of agreement that both apply. So, I guess it doesn't matter.

MR. MALLEN: Right. And so, Your Honor, I would point out that in the Trustee's reply brief, he does not speak that the transfers in this case are covered by 546(g). It doesn't -- the reply doesn't address at all whether or not the 245.5 million collateral --

THE COURT: But you got all your transfers within

two years. What difference does it make? It still comes down to willful blindness. I know there's an argument that maybe they didn't plead that Tremont had actual knowledge, but -- which they would have to plead if one of the safe harbors applied.

MR. MALLEN: Well, Your Honor, I understand Judge Rakoff's decision in the 546(g) (indiscernible) that's not the case that the actual knowledge exception to the safe harbor only applies to Section 546(e), but not Section 546(g).

THE COURT: I know that, but -- that's why I kept asking the question. I guess I haven't -- maybe I didn't get an answer whether both applied.

MR. MALLEN: Well --

THE COURT: And if 546(g) doesn't protect the transfer relating to the collateral transfer, 546(e) does. Then they both apply.

MR. MALLEN: Your Honor, we would say that they both apply. And I think from -- in our view -- perhaps Section 546(g), if all the other requirements are meant, is easier because we don't have to argue whether Tremont knew that -- with respect to Madoff's fraud.

THE COURT: Okay.

MR. MALLEN: And so if we (indiscernible) that understanding, there's not really any dispute that these

transfers are covered by Section 546(g) between the parties, and if that's the case, then with respect to all the transfers here, the claimants would be limited to actual file and transfer within two years (indiscernible).

THE COURT: Okay, but all the transfers were made within two years.

MR. MALLEN: Right.

THE COURT: The initial transfers. That's my understanding.

MR. MALLEN: Your Honor, I'm not sure it's clear on the (indiscernible).

THE COURT: Oh, I thought -- I thought I saw that --

MR. MALLEN: The subsequent transfers certainly were all made within two years.

THE COURT: Yeah. Okay. Fair enough.

MR. MALLEN: I confess I'm not as familiar with the initial transfers on the long sheet (indiscernible).

And so on this -- if I may, I'd like to move to the depletion of the estate argument.

THE COURT: Sure.

MR. MALLEN: So independently, the Trustee can't recover these transfers because they were circular transfers that do not deplete the estate. And importantly --

THE COURT: What do you mean circular transfers?

MR. MALLEN: So the transfer started at Madoff Securities.

THE COURT: Right.

MR. MALLEN: And it went around the horn to Tremont, withdrew some money from Prime Fund with a goal of shooting it to Rye XL so it could make its leveraging investment in my client. Then my client tripled it, went back to Broad Market, and it went back to Madoff Securities.

THE COURT: Where's the allegation that it was reinvested in Madoff Securities, and who got -- and who got the credit for that investment? The Trustee has already paid a settlement based on that investment.

MR. MALLEN: So, Your Honor, in terms of that it was invested in Madoff -- sorry. You're asking what that Broad -- (indiscernible).

THE COURT: Well, your assumption is -- putting aside the legal effect -- that the money, I guess, that Fortis invested with -- I'll just say Tremont, which then reinvested --

MR. MALLEN: Into --

THE COURT: Okay. And where's the allegation of that complaint?

MR. MALLEN: Well, Your Honor, in --

THE COURT: How do we know it wasn't used to pay other redemptions?

MR. MALLEN: So specifically, in the original complaint at Paragraph 119 -- you may remember this chart, which many defendants in these cases have referenced -- the Trustee created this chart which showed that in May 2008, Prime Fund withdrew 475 million to impart -- provide the defendants 125 million to upsize the swap transaction.

THE COURT: But okay. Let's assume you're right.

MR. MALLEN: Sure.

THE COURT: But then when the Trustee settles with Prime Fund -- with Tremont, it's based on Tremont's net equity claim, and Tremont is getting credit for its net equity claim based on any investment that Tremont made in BLMIS. And then Trustee is paying out on that, so how is that not a depletion of the estate? If you had never returned the money, the Trustee wouldn't be paying out that money to Tremont.

MR. MALLEN: Well, Your Honor, I think we're -- there -- we have -- there are two responses to this. One is looking at that this is a single integrated transaction and looking at the cases like Adelphia. They state that if you're looking at this integrated transaction at the times of -- time of the -- this circular transfer, those transfers aren't filing conveyances if at that time the money -- or they say it was not depleted at that time because the money went around the horn and went back to the Debtor.

And then the second point to be made is just that we point out that Broad Market had a 1.6 billion customer claim, was a big-time net loser. They paid 1 billion back into the estate but only received an 800 million claim, so we think there's an inconsistent there were certain subsequent transferees may have provided additional value back to the estate, and so there may not have been depletion.

THE COURT: Okay.

MR. MALLEN: No further questions.

THE COURT: No. Ms. Griffin, what is your response to this depletion argument?

MS. GRIFFIN: I guess I'm confused, Your Honor. It's -- the cases that talk about the round tripping, it's usually where the debtor takes the money out and gives it to somebody else who then passes it back in. And what we're talking about here is a situation where Tremont has on a rolling basis has Fortis redeeming. It has other people coming in. It replaces Citibank. You know, it's -- this defendant is not -- is not round-tripping anything with the debtor. It's taking its money out, and it's keeping it. And the other defendants are doing the same. So the fact that other people come in, that's what the Ponzi is.

THE COURT: Well, maybe the answer is that the money that they invested is not the money that was taken

out.

MS. GRIFFIN: Correct. That's what the Ponzi scheme is, Your Honor.

You know, I guess -- very quickly. I'm not going to feed the dead horse on everything we've talked about before, Your Honor, but all of the things that Mr. Harris pointed to about they did due diligence, they reviewed the trade tickets, reconstructed trade tickets, all of these did not give the independent trade information that Buckley wanted in 2003. She wanted two independent streams to verify.

All shoestrings about the excellent track record of Madoff, Cadogan -- again, FMM's partner -- said at the time, yeah, they had a great track record, but you couldn't get any meaningful information. So none of that diligence works.

The fact that the Defendants didn't use the risk of fraud language in their documents, if you look at the Optimal decision, Your Honor, questions going to the existence of the -- of the assets, whether or not there is trades -- and, by the way, Buckley actually is the person. Not all the documents that we cited to were actually included by Defendants when we submitted them, and we certainly -- I don't make it a practice to attach a ton of things, but if you look at --

THE COURT: I'll consider what you want me to consider --

MS. GRIFFIN: Sure.

THE COURT: -- as long as it's --

MS. GRIFFIN: Sure, Your Honor.

THE COURT: -- you know, can be considered. But I can't go looking through --

MS. GRIFFIN: No, no. I --

THE COURT: -- records hoping to find some gold for you.

MS. GRIFFIN: Okay. If you look at Paragraph 1 -- oh -- 114.

THE COURT: Of the complaint?

MS. GRIFFIN: Yes.

THE COURT: Let me just get there.

MS. GRIFFIN: There's an email string in September 1, 2003. And Your Honor thought that there were some documents that say that they thought there was the possibility of no securities trading. This is the exact paragraph I was talking about.

THE COURT: Mh hmm.

MS. GRIFFIN: I am still extremely uncomfortable with giving financing to so-and-so and now possibly redacted given their investment in Harley and the broker-dealer with Madoff. Before that option can be considered, we'll need

some assurance in how the front and back office are separated. And if two separate streams of trade information can be provided, that will allow independent reconciliation of trades in Harley. Without this, I do not support financing.

THE COURT: Well, yeah, but that's a risk analysis. It's not -- it's not saying we don't think he's trading securities. It's just saying you can't confirm what he's doing.

MS. GRIFFIN: Your Honor --

THE COURT: And I understand they might not want to invest on that -- or participate on that basis.

MS. GRIFFIN: They --

THE COURT: But that's a far cry from saying I think there's a high probability that he's not trading securities or engaged in any other fraud.

MS. GRIFFIN: On this basis, they suggested that they should -- that they should get their client to try to get another custodian appointed, that they -- that they should cease providing administrator services. One -- Roger Hanson said if we cannot get the jurisdiction changed, we have no choice but to resign. We have no choice to resign as the administrator. Fortis Multi-Management is reported as being nervous, apprehensive. These words are words that don't say, hey, we're worried that the pricing might be

wrong. These are serious actions and reactions to a real concern that they articulate -- Sue Novo. If you go through our complaint again, they are asking questions. Does he have custody of the assets? Do we have information that can verify trading is happening? And the Optimal case says that goes to the heart of the existence of the Ponzi scheme here. That is Judge Scheindlin, and I think she's citing to the (indiscernible) case as well.

So, Your Honor, with regard to one other question with respect to whether the Bahamas law eliminated a duty, Your Honor, I'm going to start with this is all a misdirect. They litigate by hindsight here trying to create issues of fact as opposed to looking at what the people at the time thought was going on.

If you look at our allegations, it's the act, not the regulations Defendants attach in there at declaration. I can point you to the Bahamas's act if you want to. We can get into a whole legal debate about what the scope of the act was and what it was. But in the act, which we pulled up again. Because I thought it was irrelevant, I didn't deal with it on reply. But the act made it clear that in 2003, the administrator -- it's not attached, Your Honor. The regs are attached to --

THE COURT: Mh hmm.

MS. GRIFFIN: -- that declaration. I'll be happy

to submit the two sets of acts subsequently.

Again, Your Honor, this is a misdirect, and it's not really relevant, but I want you to understand the act in the 2003 made the administrator have to verify that the licensing requirements continued to be met. And those licensing requirements now require that the fund verify its custodians and its investment manager were fit improper. And it was that -- that act is what prompted Sue Novo to say -- this is her words. We don't have to have a lawyer debate. What we think in 2019 doesn't matter. She says in Paragraph 105, all in all, if these funds still fall under Bahamas Securities Commission for the present, then irrespective of anything else, we need to be very careful in that the responsibilities of the administrator are (indiscernible) with someone of an overall responsibility for the fund, responsibility to investors -- and I'll skip to the end -- and I believe in the latest legislation responsibility for the custodian. Be very careful I believe the legislation makes us responsible for Madoff.

That is evidence of how high probability of -- that they're not engaging in trades, Your Honor, that they don't have custody --

THE COURT: Why doesn't it mean they just can't confirm the information?

MS. GRIFFIN: That's not an option under the act.

THE COURT: Well, I don't know. I --

MS. GRIFFIN: They -- that's what she thinks.

THE COURT: I don't know what the act says. I don't have any affidavits from experts on what the act says, but you're telling me that it doesn't matter what the act says, that I have to look at the concerns --

MS. GRIFFIN: That it's --

THE COURT: -- of the people. And, you know, when I read this, I get it. They couldn't confirm that he was the custodian. They couldn't confirm some other things, but that doesn't mean that they think he's not trading -- that there's a high probability that he's not trading securities. And even as counsel pointed out in your reply memo -- I'll just get the language -- you're saying Fortis had a subjective belief that Madoff might not be engaged in trades and could be misappropriating customer assets. That doesn't sound like a high probability.

MS. GRIFFIN: Your Honor, it gets repetitive when you write a brief, but when you look at Paragraph 11 --

THE COURT: That's what I'm reading.

MS. GRIFFIN: No, I know. But if you look at Paragraph 11 of our complaint, this highly affirmative action by Fortis not only demonstrates the high degree of probably of fraud at BLMIS that they saw and that demonstrates their willful blindness. We have highly -- I

can go through and highlight the number of times we say that there is a high probability of fraud and that he's not trading or not custodian.

It -- the fact that I was loose on language in a reply is definitely not what you should look at. You should look at the well-pleaded facts of our complaint.

THE COURT: All right.

MS. GRIFFIN: And I think, Your Honor, with that, unless you have any further questions --

THE COURT: No. I'll reserve decision. Thank you very much.

MS. GRIFFIN: Thank you.

(Whereupon these proceedings were concluded at 11:16 AM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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